

Summary of SC89832, *State of Missouri v. John L. Richard*

Appeal from the Mississippi County circuit court, Judge William H. Winchester III
Opinion issued Nov. 17, 2009

Attorneys: The state was represented by Karen L. Kramer and Shaun J. Mackelprang of the attorney general's office in Jefferson City, (573) 751-3321; and Richard was represented by Craig A. Johnston of the public defender's office in Columbia, (573) 882-9855.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: The state appeals the trial court's dismissal of an information charging a man with one felony count of possession of a loaded firearm while intoxicated after finding the statute was unconstitutional. In a 7-0 decision written by Judge Richard B. Teitelman, the Supreme Court of Missouri holds that the statute is not unconstitutional, either on its face or as applied in the facts of this case at this early stage of litigation and, therefore, that the trial court erred in dismissing the charges. In a concurring opinion, Judge Zel M. Fischer notes that the Second Amendment applies to the states, as incorporated through the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The significance of the determination that the Second Amendment applies to state and local governments ensures that the right to bear firearms has the same protections as other fundamental rights.

Facts: The state charged John Richard with one felony count of possession of a loaded firearm while intoxicated. In its information and probable cause affidavit, the state alleged that, during a dispute with his wife, Richard threatened to kill himself by "blowing his head off" and told his wife that if she called the police, he would go outside with a gun and make the police shoot him. The state alleged that Richard then ingested an unknown amount of morphine and amitriptyline and that, when police arrived, Richard was seated in his home, unconscious, intoxicated, and in possession of a loaded handgun and extra ammunition. Richard moved to dismiss the information, alleging that the statute under which the state was charging him was unconstitutional. The trial court sustained his motion, finding that section 571.030.1(5), RSMo Supp. 2008, is unconstitutional to the extent it prevents a citizen from possessing a firearm inside the citizen's home while the citizen legally is intoxicated. The state appeals.

REVERSED AND REMANDED.

Court en banc holds: (1) Section 571.030.1(5) is not unconstitutional on its face and is not overbroad. The overbreadth doctrine is limited to the context of the First Amendment. Because Richard's case does not involve a First Amendment issue, the overbreadth

doctrine does not apply, and there is no basis for holding that section 571.030.1(5) is unconstitutional on its face.

(2) Section 571.030.1(5) is not unconstitutional as applied. The United States Supreme Court never has held specifically that the Second Amendment of the United States Constitution applies to the states, but in *District of Columbia v. Heller*, 128 S.Ct. 2783, 2817 (2008), it did note that the Second Amendment does not confer an unconditional right to bear arms and that certain statutes limiting the possession of firearms are “lawful regulatory measures.” The right under article I, section 23 of the Missouri Constitution to keep and bear arms also is not absolute, and the state has the inherent power to regulate the carrying of firearms as a proper exercise of its police power. Because possession of a loaded firearm by an intoxicated individual poses a demonstrated threat to public safety, section 571.030.1(5) represents a reasonable exercise of the state’s legislative prerogative to preserve public safety. Because the circuit court here dismissed the charges before trial, the ultimate facts of the case have yet to be established, but the facts – as alleged by the state in the information – constitute a violation of section 571.030.1(5) and may be regulated within the legislature’s police power. At this point in the case, there is no issue of self-defense, and Richard has no standing to raise hypothetical instances in which the statute might be applied unconstitutionally. The circuit court erred in dismissing the state’s information charging Richard with violating the statute.

Concurring opinion by Judge Fischer: The author agrees that section 571.030 is not unconstitutional on its face, or as applied to the defendant, and does not violate article I, section 23 of the Missouri Constitution. He writes separately to note that, even though the United States Supreme Court has not yet so declared, the Second Amendment to the United States Constitution does apply to the states and does confer an individual right to keep and bear arms. In *Heller*, the United States Supreme Court confirmed that the individual right to possess and carry weapons for lawful purposes such as self-defense is a fundamental right apart from service in a militia. The Missouri legislature’s decision to criminalize possession of a firearm while intoxicated and the state’s action pursuant to section 571.030.1(5) in prosecuting Richard, who was not involved in self-defense, are reasonable and do not violate the Second Amendment.